

NANCY SWEENEY
CLERK-DISTRICT COURT

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MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

*****)

JACK M. and CAROLYN M. SCANLON,
GARY L. and BEVERLY J. BECK,
LARRY and VIOLET BECK, RICHARD
and MARY GRANBERG, RICHARD and
ROBERTA URWILLER, WILLIAM
INKRET, JR., M.D., PC Trust
and Individually,

Cause No. CDV-92-1829

MEMORANDUM AND ORDER

Petitioners,

and

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE
OF MONTANA and MAGELLAN
RESOURCES, INC.,

Respondents.

IN THE MATTER OF THE APPLICATION
FOR CHANGE OF APPROPRIATION OF
WATER RIGHT G(W) 096235-76GJ
BY MAGELLAN RESOURCES, INC.

*****)

Before the Court is the petition of Jack M. Scanlon, et al.
(Petitioners) for judicial review of the final order of Vivian

CASE # 96235

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1 A. Lighthizer, hearing examiner for the Department of Natural
2 Resources and Conservation (DNRC), issued December 8, 1992.
3 With certain restrictions, that order granted the bulk of the
4 application of Magellan Resources, Inc. (Magellan) to change the
5 purpose of use, and place of use, of a portion of its water
6 right in Deer Lodge County, Montana. The matter has been fully
7 briefed and argued and is ready for decision.

8 BACKGROUND

9 Magellan acquired the water right at issue in 1987 because
10 it needed water for mineral exploration it was conducting in the
11 Southern Cross Mining District near Georgetown Lake. Magellan
12 began using water from Trilby Spring that year. However, in
13 July of 1990, Magellan found that its right to water from Trilby
14 Spring, which flows from a collapsed adit, was limited to
15 domestic use. Consequently, in October of 1990, Magellan applied
16 to DNRC for a change in the purpose of use from domestic to
17 mining, and a change in the place of use from its buildings to
18 its exploratory sites for a portion of its water right. The
19 balance of the water right is owned by the Trilby Homeowners
20 Association which represents five homeowners. During the
21 pendency of this case, Magellan has been hauling the water it
22 requires from a location four miles from its operations.

23 Notice of Magellan's application was published by DNRC in
24 the Philipsburg Mail. Using the U.S. mail, DNRC also notified

1 individuals and public agencies which it determined might be
2 interested in the change. DNRC received 15 timely objections to
3 Magellan's application.

4 On May 11, 1992, a hearing was held in Anaconda on
5 Magellan's application. Testimony was taken and exhibits were
6 received. Petitioners are homeowners to the east who draw their
7 water from a spring located on their property and known as the
8 Scanlon Spring. The Trilby Homeowners Association participated
9 as objectors in the DNRC proceedings, but the association is not
10 a party to the instant action.

11 Hearing examiner John E. Stults issued his proposal for
12 decision in this matter on September 1, 1992, in which he
13 recommended approval of Magellan's application to change the
14 purpose of use and the place of use of water from the Trilby
15 Spring from domestic to mining. The hearing examiner attached
16 certain conditions, however, including modifications to the
17 water supply system Magellan would have to make in order to help
18 ensure the homeowners' water needs were met first. He also cut
19 by half the volume of water Magellan had proposed changing in
20 its application.

21 For the most part, the final order issued by DNRC's hearing
22 examiner Vivian A. Lighthizer on December 8, 1992, adopted
23 Stults' findings of fact and conclusions of law.

24 This Petition for Judicial Review followed on December 18,

25 Page 3 -- MEMORANDUM AND ORDER

CASE # 96235

1 1992.

2 STANDARD OF REVIEW

3 The standards for judicial review of an agency decision are
4 set forth in Section 2-4-704, M.C.A., which reads:

5 (1) The review shall be conducted by the court
6 without a jury and shall be confined to the record.
7 In cases of alleged irregularities in procedure before
8 the agency not shown in the record, proof thereof may
9 be taken in the court. The court, upon request, shall
10 hear oral argument and receive written briefs.

11 (2) The court may not substitute its judgment
12 for that of the agency as to the weight of the
13 evidence on questions of fact. The court may affirm
14 the decision of the agency or remand the case for
15 further proceedings. The court may reverse or modify
16 the decision if substantial rights of the appellant
17 have been prejudiced because:

18 (a) the administrative findings, infer-
19 ences, conclusions, or decisions are:

20 (i) in violation of constitutional or
21 statutory provisions;

22 (ii) in excess of the statutory authority
23 of the agency;

24 (iii) made upon unlawful procedure;

25 (iv) affected by other error of law;

(v) clearly erroneous in view of the reli-
able, probative, and substantial evidence on the
whole record;

(vi) arbitrary or capricious or char-
acterized by abuse of discretion or clearly
unarranted exercise of discretion; or;

(b) findings of fact, upon issues
essential to the decision, were not made
although requested.

The Montana Supreme Court has interpreted this statute to
mean that agency findings of fact are subject to a clearly

1 erroneous standard of review. Harris v. Bauer, 230 Mont. 207,
2 212, 749 P.2d 1068, 1071 (1988). Further, the petitioner for
3 review bears the burden of showing that he has been prejudiced
4 by a clearly erroneous ruling. Terry v. Board of Regents, 220
5 Mont. 214, 217, 714 P.2d 151, 153 (1986) citing Carruthers v.
6 Board of Horse Racing, 216 Mont. 184, 188, 700 P.2d 179, 181
7 (1985).

8 The Supreme Court has recently set out the test to be used
9 to determine if a finding is clearly erroneous. In St. Comp.
10 Mut. Ins. Fund v. Lee Rost Logging, 252 Mont. 97, 827 P.2d 85
11 (1992), the Court held that it will first "review the record to
12 see if the findings are supported by substantial evidence." If
13 they are, the Court will then "determine if the trial court has
14 misapprehended the effect of evidence." If those two threshold
15 determinations have been met, the Court "may still find that 'a
16 finding of fact is "clearly erroneous" when, although there is
17 evidence to support it, a review of the record leaves the court
18 with the definite and firm conviction that a mistake has been
19 committed.'" Id. at 102, 827 P.2d at 88. Thus, the Court has
20 now inserted an intermediate step in the process.

21 The Court has also recently held that conclusions of law
22 should be reviewed to determine if the agency's interpretation
23 of the law is correct, rejecting the former abuse of discretion
24 standard. Steer. Inc. v. Dept. of Revenue, 245 Mont. 470, 474,

1 803 P.2d 601, 603 (1990).

2 DISCUSSION

3 Three issues are presented in this action for judicial
4 review. They will be discussed in the order Petitioners have
5 presented them and in the manner they have framed them.

6 I. WHETHER DNRC CAN APPROVE AND AUTHORIZE AN APPLICATION
7 FOR A CHANGE OF WATER USE FROM DOMESTIC TO MINING PRIOR
8 TO THE ISSUANCE OF A MINING PERMIT BY THE DEPARTMENT OF
9 STATE LANDS.

10 The main thrust of Petitioners' argument on this point is
11 that DNRC cannot approve Magellan's application because the
12 company lacks a mining permit. Petitioners also contend that
13 under Section 82-4-222, MCA, the Department of State Lands is
14 barred from issuing a mining permit until Magellan has submitted
15 a detailed application that includes any possible effects on
16 surface and ground waters.

17 The response to this argument is contained in Section 85-2-
18 402(2), MCA (1991). That statute provided in part:

19 Except as provided in subsections (3) through
20 (5), the department shall approve a change in
21 appropriation right if the appropriator proves by
22 substantial credible evidence that the following
23 criteria are met:

24 (a) The proposed use will not adversely
25 affect the water rights of other persons or
other planned uses or developments for which a
permit has been issued or for which water has
been reserved.

(b) Except for a lease authorization
pursuant to 85-2-436 that does not require

1 appropriation works, the proposed means of
2 diversion, construction, and operation of the
appropriation works are adequate.

3 (c) The proposed use of water is a
4 beneficial use.

5 (d) The applicant has a possessory
6 interest, or the written consent of the person
7 with the possessory interest, in the property
where the water is to be put to beneficial use.
(Emphasis added.)

8 As advanced by DNRC and Magellan, once these criteria have
9 been met by substantial credible evidence offered by the
10 applicant, the agency is left with only a nondiscretionary
11 function to perform, viz., the approval of the requested change.

12 Section 85-2-402(2), MCA, is quite clear as to what the
13 applicant must prove. Nowhere in the list of statutory criteria
14 is there a mention that the applicant must have a mining permit
15 or any other permit in hand before going to DNRC for a change in
16 appropriation rights. This Court cannot insert a new require-
17 ment into the process beyond those set forth in the statute.
18 The Court concludes, therefore, that Magellan did not have to
19 obtain a mining permit before DNRC could approve its
20 application.

21 II. WHETHER DNRC'S PUBLIC NOTICE OF MAGELLAN'S APPLICA-
22 TION FOR CHANGE OF WATER USE AND THE DEPARTMENT'S
SUBSEQUENT HEARING COMPLIED WITH THE LEGAL NOTICE
REQUIREMENTS OF SECTION 85-2-307, MCA.

23 Section 85-2-307, MCA (1991), provided in part that:

24 (1)(a) Upon receipt of a proper application for
25

1 a permit, the department shall prepare a notice
2 containing the facts pertinent to the application and
3 shall publish the notice once in a newspaper of
4 general circulation in the area of the source.
(Emphasis supplied.)

5 DNRC published notice of Magellan's application in the
6 Philipsburg Mail of March 21, 1991. That newspaper is published
7 in Philipsburg, located in Granite County. Petitioners chal-
8 lenge the hearing examiner's finding of fact 2 and conclusion of
9 law 2, in his proposal for decision, to the effect that this
10 newspaper meets the statutory requirement of being "in the area
11 of the source." Petitioners argue that Anaconda-Deer Lodge
12 County is the location of the source of the proposed change of
13 use and that, consequently, interested persons did not receive
14 notice.

15 Clearly, the water right proposed for change is located in
16 Deer Lodge County. But given the wording of the statute, the
17 Philipsburg Mail provided adequate notice of Magellan's appli-
18 cation since the paper is in the area of the source.

19 The hearing examiner had before him a map which showed
20 where the source is located and where the water at issue flowed,
21 the location of the property owners, the list of individuals
22 DNRC had mailed notice to and the list of objectors. He had
23 concluded in a pre-hearing ruling that the Philipsburg Mail was
24 in the area of the source. The Court agrees with that conclu-
25 sion. "In the area of the source" is a fairly broad term which

1 properly encompasses the Philipsburg Mail.

2 This Court previously denied Petitioners' request to
3 present additional evidence on this point at the District Court
4 hearing on the petition. As the Court stressed at that time,
5 absent extraordinary circumstances which would allow the Court
6 to hear additional evidence, Petitioners' Request for Judicial
7 Review is limited to a review of the administrative record.
8 Having reviewed the record, the Court finds that the hearing
9 examiner had substantial credible evidence before him that
10 supports his decision.

11 III. WHETHER MAGELLAN HAS CARRIED ITS BURDEN OF PROOF
12 UNDER SECTION 85-2-402, MCA, THAT ITS PROPOSED CHANGE
13 OF WATER USE FROM DOMESTIC TO MINING WILL NOT ADVERSELY
AFFECT THE RIGHTS OF OTHERS AND OTHER PROPOSED USES.

14 As it did at the administrative level, Petitioners'
15 argument on appeal centers not on the allegedly negative impact
16 of Magellan's request for a change in the purpose of use, and
17 place of use, of its water right, but on the damage purportedly
18 done by the exploratory drilling's use of Minex 1330, a liquid
19 polymer mud. Petitioners also allege a total loss of domestic
20 water from Scanlon Spring since Magellan's exploratory drilling
21 began.

22 As Section 85-2-301, MCA, sets out, water may be appropri-
23 ated only for a beneficial use. Mining is such a beneficial
24 use. Section 85-2-102(2)(a), MCA.

1 Petitioners presented no evidence that Minex 1330 causes
2 adverse health effects. Magellan, on the other hand, presented
3 evidence that it has tested the Trilby Spring water for years
4 without finding any change in its chemistry that would indicate
5 contamination. Additionally, the state of Montana has approved
6 the use of Minex 1330 for mining exploration. Furthermore, the
7 drilling program is regulated by the Department of State Lands
8 and will continue regardless of whether the water use change is
9 approved.

10 As to the loss of water from Scanlon Spring, there is no
11 evidence indicating that it is a result of the appropriation of
12 water for use in Magellan's drilling program. Magellan intro-
13 duced evidence that Scanlon Spring and Trilby Spring receive
14 their water from separate sources. Petitioners did not submit
15 evidence disputing this. Furthermore, no additional water will
16 be taken from Trilby Spring under the proposed change.

17 For the foregoing reasons, the Court concludes there is
18 substantial credible evidence in the record to affirm the final
19 order granting Magellan's application to change its water right.

20 NOW, THEREFORE, IT IS ORDERED that the final order of the

21 /////

22 /////

23 /////

24 /////

25

1 Department of Natural Resources and Conservation dated December
2 8, 1992, is AFFIRMED.

3 DATED this 17th day of March, 1994.

4
5 
6 District Court Judge

7 pc: Jack M. Scanlon
8 Donald D. MacIntyre
9 Holly J. Franz

10 Magellan.m&o

11 k

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DEC 21 1992

MONT. DEPT. of NATURAL
RESOURCES & CONSERVATION

CLARA GILBREATH
CLERK OF COURT

DEC 18 1 39 PM '92

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4 Attorney For Petitioners Scanlon et. al.

THOMAS D. HORNEL
PRESIDING JUDGE

8 MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

9 * * * * *

10 JACK M. and CAROLYN M. SCANLON, GARY L.)
and BEVERLY J. BECK, LARRY and VIOLET)
11 BECK, RICHARD and MARY GRANBERG, RICHARD)
and ROBERTA URWILLER, WILLIAM INKRET,)
12 JR., M.D., PC Trust and Individually,)

13 Petitioners,)

14 and)

15 DEPARTMENT OF NATURAL RESOURCES AND)
CONSERVATION OF THE STATE OF MONTANA,)
16 and MAGELLAN RESOURCES, INC.,)

17 Respondents,)

18 IN THE MATTER OF THE APPLICATION FOR)
CHANGE OF APPROPRIATION OF WATER RIGHT)
19 G(W) 096235-76GJ BY MAGELLAN RESOURCES,)
INC.)
20)

21 * * * * *

22 COMES NOW the Petitioners, by and through their attorney and
23 pursuant to Section 2-4-701 et. seq. MCA, and hereby petition this
24 Court to review the Final Order of the Department of Natural
25 Resources and Conservation issued on December 8, 1992. Copies of

1. PETITION FOR JUDICIAL REVIEW

CASE # 96235

CAUSE NO COO 92-1829

PETITION FOR
JUDICIAL REVIEW

1 the said Final Order were previously served on all parties of
2 record by the Respondent.

3 1. Jurisdiction and venue are proper in this Court pursuant
4 to Section 2-4-702(2)(a), MCA.

5 2. On March 3, 1991, Respondent Magellan Resources, Inc.
6 filed Application No. G(W) 096235-76GJ for change in place and use
7 of 9 acre-feet of water from domestic to mining use, and "that
8 water will be used for mining."

9 3. On May 11, 1992, a hearing was held in Anaconda, Montana
10 to determine whether the authorization to change the appropriation
11 of water right should be granted to the Respondent Magellan
12 Resources, Inc.

13 4. On December 8, 1992, the Respondent Department of Natural
14 Resources and Conservation entered its Final Order granting the
15 Respondent Magellan Resources, Inc. application with certain
16 conditions.

17 5. The Petitioners have exhausted all administrative
18 remedies and are aggrieved by the said Final Order for the
19 following reasons:

20 a. the hearing on May 11, 1992, was held without
21 proper and legal notice of the same being given in
22 violation of Section 85-2-307, MCA.

23 b. the Respondent Magellan Resources, Inc. does
24 not possess a mining permit as required by Section 82-4-
25 121, MCA, and thus cannot obtain a change of water usage

2. PETITION FOR JUDICIAL REVIEW

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1 from a domestic use to a mining use until such permit is
2 obtained.

3 c. the Respondent Magellan Resources, Inc. failed
4 to produce any competent evidence to establish the change
5 of water use from domestic to mining is beneficial and
6 will not adversely affect the Petitioners as required by
7 Section 85-2-402, MCA.

8 WHEREFORE, Petitioners move this Court for its Order:

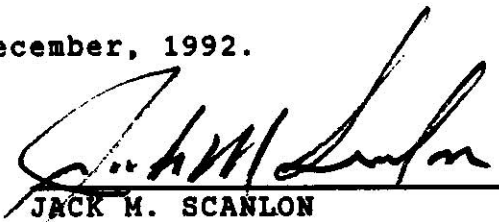
9 1. For judicial review of the Final Order of the Department
10 of Natural Resources and Conservation dated December 8, 1992.

11 2. Vacating and setting aside the Final Order of the
12 Department of Natural Resources and Conservation dated December 8,
13 1992, in its entirety.

14 3. Granting the Petitioners costs and attorney fees.

15 4. Allowing the Petitioners such other and further relief
16 as is just and proper.

17 DATED this 18th day of December, 1992.

18
19 
20 JACK M. SCANLON
21 Attorney For Petitioners
22
23
24
25

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PETITION FOR JUDICIAL REVIEW was duly served upon all parties of record at their address or addresses this 18th day of December, 1992, as follows:

Magellan Resources, Inc.
1111 Bayhill Drive, Suite 210
San Bruno, CA 94066-3035

Daniel W. Unti
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701 Fifth Avenue
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2005 W. Park St.
Anaconda, MT 59711

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Raymond V. White Estate
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Anaconda, MT 59711

Bette Lou Swanson
1817 Ogden
Anaconda, MT 59711

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8438 SW 42nd Ave.
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Gary L. Beck
Beverly J. Beck
93 East Side Road
Deer Lodge, MT 59722

Monida Unti
317 West Commercial
Anaconda, MT 59711

Judge James E. Purcell
P.O. Box J
Butte, MT 9703
(for notification only)

Bruce Evans, Jr.
Cynthia Evans
1255 W. Aluminum St.
Butte, MT 59701-2101

Georgetown Lake Home
Owners' Association, Inc.
% Leo V. Kelly, Mr., V.P.
Georgetown Lake
Anaconda, MT 59711
(for notification only)

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Waterman
P.O. Box 1715
Helena, MT 59624-1715

T. J. Reynolds and
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Helena Water Resources
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1520 East 6th Avenue
Helena, MT 59620-2301

Ted J. Doney
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P.O. Box 1185
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1 John E. Stults,
2 Hearing Examiner
3 Department of Natural
4 Resources & Conservation
5 1520 East 6th Avenue
6 Helena, Mt 59620-2301


JACK M. SCANLON
Attorney for Petitioners

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5. PETITION FOR JUDICIAL REVIEW

CASE # 96235

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHT G(W)096235-76GJ BY MAGELLAN)
RESOURCES, INC.)

* * * * *

The Proposal for Decision (Proposal) in this matter was entered September 1, 1992. Applicant and Objectors Scanlon, et al., (Snowbird) and White, one of the Trilby Homeowners, filed timely objections to the Proposal but did not request oral argument. Elmer A. Johnson submitted a statement concerning his well but did not except to any particular Finding of Fact or Conclusion of Law.

The Proposal recommended issuance of a conditional Authorization to Change Appropriation Water Right to Magellan Resources, Inc. (Magellan or Applicant) to change the purpose of use and place of use of 73 gallons per minute (gpm) up 4.5 acre-feet of water per year from a spring tributary of the North Fork of Flint Creek, also known as Trilby Spring, from January 1 through December 31 of each year. The purpose of use could be changed from domestic to mining. The place of use could be changed from domestic and lawn and garden facilities in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9, Township 5 North, Range 13 West, Deer Lodge County, to various exploratory drilling locations throughout Sections 4, 5, 8, and 9, Township 5 North, Range 13 West, Deer

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Lodge County.¹ The diversion and conveyance works would include 3,000 gallons of off-stream storage in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9.

Based upon the evidence in the record as it relates to the ability of Applicant to change the subject water right without increasing the historic burden on the source, the Proposal for Decision recommended that part of the Application to Change, 4.5 acre-feet per year, be denied.

Applicant excepts to Conclusion of Law 4 on the basis that the general principles of law contained in this Conclusion have no application to Applicant's change application. Applicant asserts that the Water Court has already determined ownership and volume, therefore the Department has no authority to make preliminary determinations otherwise and that the language concerning the *prima facie* status of statements of claim has no applicability since the temporary preliminary decree issued for Applicant's water right has already gone through the objection and hearing stage of adjudication.

Applicant also excepts to Conclusion of Law 6 on the basis that the Department lacks jurisdiction to alter the ownership and volume of Applicant's water right as these elements have already been determined by the Water Court. Applicant argues that once a water right is contained in a temporary preliminary decree and has gone through the objection and hearing stage of the

¹Except as otherwise stated, all legal land descriptions in this Order are in Township 5 North, Range 13 West, Deer Lodge County.

adjudication, the Department must rely on the decreed water right and that the Department can only make preliminary determinations if the specific element at issue has not been determined by the decree. Applicant asserts that in this case, ownership and volume have already been determined by the Water Court, and according to Mont. Code Ann. § 85-2-227, the Department must rely on the Water Court's determination. Applicant further argues that even if the Department could determine volume, the Hearing Examiner failed to make any findings of fact concerning the relative amount of water used by Magellan and the Trilby homeowners and that the evidence at hearing showed the historic use of Magellan's predecessor-in-interest exceeded the use of the Trilby homeowners.

A temporary preliminary decree is neither a final decree nor a final immutable statement of a water right. See Mont. Code Ann. § 85-2-231, *et seq.* (1991); McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986). Therefore in change proceedings, a temporary preliminary decree may provide evidence of existing rights but does not dictate the Department's decision. In re Application 63377-s76G by Hollenback. Here Applicant seeks to change a portion, nine acre-feet, of Claim W096235-76GJ from domestic to mining when documents filed with the claim clearly state the claim was for water to supply eight residences or households. The Statement of Claim form itself contains the statement that the water use claimed reflects a level equivalent to eight households of four persons each. In a letter written by

Gerret Ouldhouse on April 2, 1991, in response to a letter from Mark Behan, Mr. Ouldhouse states that he was responsible for furnishing water to the people who had homes on the Trilby Mining Claim. (Finding of Fact 10.) It is clear that a right to use the water for domestic purposes was included with each tract of the Trilby Mining Claim. The total amount of water claimed by Claim W096235-76GJ is 73 gallons per minute up to 12 acre-feet of water per year. Water must be supplied to the five homeowners. Five-eighths of 12 acre-feet of water is 7.5 acre-feet of water. That leaves 4.5 acre-feet of water available to change, not nine acre-feet as Applicant requested. See Proposal at 29 n. 2.

The Hearing Examiner did make Findings of Fact concerning the relative amount of water used by Applicant and Trilby homeowners. Findings of Fact 8, 9, 10, 11, 12, and 13 all address the historic use of water by the Applicant's predecessor and the Trilby homeowners. Gerret Ouldhouse, when the claim was filed, indicated the amount of water was equivalent to eight residences. Since the water was used in the five Trilby homeowners' residences (five-eighths of the residences) that means Applicant has used the equivalent of three-eighths of the residences. There is no other evidence on the record as to the amount of water used by Applicant or the Trilby homeowners.

Applicant misinterprets the meaning of administering as used in Mont. Code Ann. § 85-2-227. Administering water rights means the allotting, admeasuring, and delivering of water. It has nothing to do with the Department's administrative process. To

understand the specific meaning of "administering" in Mont. Code Ann. § 85-2-223, one must look at the Act approved Apr. 21, 1989, ch. 604, 1989 Mont. Laws Vol II (now codified as amended at Mont. Code Ann. §§ 3-7-201, 3-7-211, 3-7-212, 3-7-501, 85-2-227, 85-2-406, and 85-5-101(1991)). This act speaks to the designation of a water judge (§ 3-7-201), appointment of water commissioners (§ 3-7-211), enforcement of decrees (§ 3-7-212), jurisdiction over certified cases (§ 3-7-501), district court supervision of water distribution (§ 85-2-406), appointment of water commissioners (§ 85-5-101), and claim to constitute *prima facie* evidence (§ 85-2-227). All the statutes amended by this act address the allotting, admeasuring, and distribution of water. They have no reference, relationship, or impact to the authorization of changes which is essentially a licensing function initiated by voluntary application of a water right owner. Conclusions of Law 4 and 6 represent a correct interpretation of the law, are based on substantial credible evidence, and will not be modified.

Objector Snowbird excepts to Conclusions of Law 1 and 2. Objector Snowbird asserts the Public Notice to Water Users is invalid and in violation of Mont. Code Ann. § 85-2-302, in that the *Philipsburg Mail* is published and circulated only in Granite County, Montana, and the water rights and proposed change of use is for Applicant's operation in Deer Lodge County, Montana. Applicant asserts the only newspapers of general circulation in the area of the source of water rights are the *Anaconda Leader* in

Anaconda, Deer Lodge County, Montana, and the *Montana Standard*, Silver Bow County, Montana.

Objector Snowbird, on October 25, 1991, filed a Motion to Dismiss or Continue Application complaining *inter alia* that the Public Notice to Water Users was published in the *Philipsburg Mail* which, according to Objector Snowbird, is circulated only in Granite County and that the Applicant's water rights and proposed change of use is for its operation in Deer Lodge County, Montana. Further, according to Objector Snowbird, the notice should have been published in the *Anaconda Leader* and the *Montana Standard*, the only newspapers of general circulation in the area of the source and as a result of the invalid notice, numerous persons who may necessarily be real parties in interest have not received proper notice. The Hearing Examiner denied that Motion on November 18, 1991, stating in relevant part,

. . . The statute says that notice must be published at least once in a newspaper of general circulation in the area of the water source. The Department has no written policies or rules further defining this statutory requirement. Choice of which specific newspaper should publish the notice is at the discretion of Department staff. "General circulation in the area" has not been defined as being the county containing the proposed project, or being the widest or densest circulation. The *Philipsburg Mail* is generally circulated in the area of this proposed project. Furthermore, the Department augmented publication of the notice with the optional procedure of sending individual notices to parties they determined may have an interest in the proposed project.

. . . The notice used by the Department was proper. It did result in timely objections being filed against this Application. The Hearing Examiner is aware of no persons who have indicated, in the seven months since the close of the period for filing objections, they recently found out about this Application and wish to object to it or that they have

an interest that may motivate them to participate in this proceeding.

This reviewer agrees with the Hearing Examiner's ruling and finds that Conclusion of Law 2 is correct and will not be modified.

Objector Snowbird further asserts that Applicant neither possesses nor has it applied for a mining permit as required by Mont. Code Ann. § 82-4-227, for any area of land or water and that the Montana Department of State Lands cannot issue a mining permit until Applicant first demonstrates that the probable impact of mining in the area on the hydrologic balance will not cause material damage, both inside and outside the permit areas and that all the objectors cannot be fully informed and can now only speculate as to whether the proposed change of water use is reasonable or will adversely affect other water rights or the hydrologic balance.

Whether Applicant has a mining permit from State Lands is entirely immaterial to this Application. This Application is to change the purpose of use and place of use of an existing water right. The Department must grant an Authorization to Change if the criteria set forth in Mont. Code Ann. § 85-2-402(2) are met. None of those criteria require the Applicant to obtain a mining permit from State Lands. Nor does State Lands have jurisdiction over the changing of established water usage as intimated by Objector Snowbird. Conclusion of Law 1 is correct and will not be modified.

Objector Snowbird takes exception to Conclusion of Law 9 regarding Mont. Code Ann. § 85-2-402(2)(a) requiring Applicant to

prove by substantial credible evidence the proposed use will not adversely affect the water rights of others or other planned uses or developments on the basis that Conclusion of Law 9 is based on Exhibit 17 and the testimony of Mr. Nolan Smith. Snowbird further states that Exhibit 17 is not competent evidence to establish either the geology or its hydrology because it is merely an aerial photograph of the surface and that Mr. Smith is a geologist not a hydrologist whose testimony is not based on drilling core samples which were readily available. Snowbird asserts Applicant failed in its burden of proof as required in In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston, 249 Mt. 425, 816 P.2d 1054 (1991), to show the proposed use will not adversely affect the Objectors' waters or future planned uses and that the evidence offered by the Objectors establishes that the proposed change will continue the past practices by Applicant that have adversely affected both the quantity and quality of the subterranean waters.

Objector Snowbird is confused as to the issues before the Department. Whether Applicant has caused injury to Snowbird by its exploratory drilling is not before this Department. The issue before this Department is, will the use of the water adversely affect the water rights of other appropriators, not will further exploratory drilling using the water adversely affect the water rights of other appropriators. Applicant will continue to perform exploratory drilling whether an Authorization

to Change is granted to Applicant or not. It is the drilling that Snowbird is alleging has caused adverse effects to its water right, not the water use.

Although Conclusion of Law 9 is not based on Applicant's Exhibit 17 as Snowbird alleges, Applicant's Exhibit 17 is competent evidence for its purpose and is not "merely an aerial photograph of the surface." Applicant's Exhibit 17 is a topographic geologic map that shows the location of various geologic formations. There is an overlay which shows the location of Old Georgetown, Southern Cross, the area of drilling, and identifies springs and wells. This map was prepared by Nolan Smith, Project Geologist with Magellan, who is qualified to produce this map because of his extensive knowledge of the geology in the area.

Snowbird further argues that Applicant failed to produce its hydrologist. An applicant is not required to produce any expert witness. An applicant for a change in appropriation water right must prove the criteria for issuance of an authorization have been met. If the applicant is able to do that without expert witnesses, the Department must approve the proposed change. Applicant in the instant case chose to present its case relying on the testimony of its geologist. Whether Mr. Smith's testimony was based on core samples or his intimate knowledge of the area is not an issue. The Hearing Examiner concluded the criteria for issuance of an authorization had been met based, to a large extent, on the testimony of Nolan Smith who is qualified to

testify on the issues. Conclusion of Law 9 is correct and will not be modified.

Objectors Snowbird take exception to Conclusion of Law 10 that Applicant's proposed water use is a beneficial use, and even though Objectors admit that mining is a beneficial use of water and that exploratory drilling is an integral activity within the general category of mining, Snowbird insists Applicant must as a matter of law first obtain a mining permit as required by law as a condition precedent to changing the use of water to mining. As previously stated on page 8, whether Applicant has a mining permit is not at issue in this proceeding. Conclusion of Law 10 is correct and will not be modified.

Objector Thomas R. White excepts to Finding of Fact 2 complaining that Raymond V. White Estate did not receive an individual notice of the application for change, that he learned of the application through a telephone call and that the notice was not published in a regional or local newspaper.

The Department is required by Mont. Code Ann. § 85-2-307(b)(1) to serve the notice by first-class mail upon an appropriator of water or applicant for or holder of a permit who, according to the records of the Department may be affected by the proposed appropriation. According to the Department's records, the last known address of Raymond V. White was Star Route West, Anaconda, MT. The record shows that an individual notice was mailed to one Raymond V. White at that address. The letter was returned citing expiration of forwarding. When there is a change

of address or change of ownership, it is the water right owner's responsibility to notify the Department. The Department fulfilled its obligation for the notice procedure. Finding of Fact 2 is not clearly erroneous and will not be modified.

Objector White excepts to Finding of Fact 11 contending that the finding that statements of claim filed by Mark Behan and Raymond White are duplications of the claim filed by Gerret Ouldhouse and that they were filed because of confusion over specific procedures is not true. Objector White states these claims were filed because Mr. Behan and Mr. White did not trust the State of Montana and Gerret Ouldhouse.

Objector White did testify during the hearing that Raymond V. White filed a Statement of Claim of Existing Water Right even though he knew that Gerret Ouldhouse had informed him that he (Mr. Ouldhouse) would be filing a water right for all the Trilby homeowners. Objector White stated Claim W026047-76GJ was filed because Raymond White did not trust either the State of Montana or Gerret Ouldhouse and that Mark Behan filed Claim W012955-76GJ to get an earlier priority date. Although this is an insignificant point in this matter, Finding of Fact 11 is hereby modified as follows:

11. Statements of Claim to Existing Water Rights have been filed by Objector Behan and Objector White (members of the Trilby Homeowners' Association) on historic use of Trilby Spring water for domestic purposes on their respective tracts. The claims duplicate Statement of Claim 76GJ-W-096235-00 by Gerret Ouldhouse. Claim W026047-76GJ was filed by Raymond White because he did not trust either the State of Montana or Gerret Ouldhouse and Mark Behan filed Claim W012955-76GJ to get an earlier priority date. They

were not filed because Objectors White and Behan thought the Ouldhouse claim did not include their water use. To the contrary, Gerret Ouldhouse told them he was filing collectively on all their uses of Trilby Spring. (Department's file, Trilby's Exhibits 7 and 8, and testimony of Bruce Evans and Tom White.)

Objector White excepts to Finding of Fact 12 contending that the Hearing Examiner misinterpreted the testimony of Objector White and George Hardtla, that of the two pipes coming out of the adit, only one carries water and the other is an air pipe and that the water called overflow by Applicant is in fact the main water system for the homeowners. Mr. White further states the only overflow he is aware of is the overflow of the 30 gallon holding tank which runs into Peirson's ditch. Objector White also excepts to Finding of Fact 17 stating the measurements taken were not from the overflow but from the main domestic water source, the only water source, the pipe which flows into the small aluminum catch basin. It is Objector White's contention the pipe Applicant calls the overflow is not the overflow but the main water system. Further, Objector White states George Hardtla laid the pipe in the adit and Mr. Hardtla had stated there were two pipes, one for air and the other for water.

It appears from the record in this matter that the workings of the present water system are not completely understood by any party or witness. George Hardtla testified there were two pipes in the adit, one originally used to supply air to an air compressor used in the mining process and the other was for water. Now that the adit has collapsed, the air pipe is in all likelihood conveying water from the adit although not as much as

the main water pipe. The measurements discussed in Finding of Fact 17 are almost certainly taken from the overflow. Applicant's Exhibits 8 and 9 clearly demonstrate there is more water flowing from one pipe than from the other. Applicant's Exhibit 8 shows a mere trickle while Applicant's Exhibit 9 shows a good stream of water obviously over four gallons per minute. Findings of Fact 12 and 17 are not clearly erroneous and will not be modified.

In addition to Objector White's specific exceptions to findings of fact, he wants the Department to attach the following conditions to the installation of the storage tank and operation of the system.

- There should be some type of standard for the cistern to maintain the quality of construction and prevent the use of inadequate materials.

- The delivery pipe of the old system will be damaged in the construction of the storage system (according to Objector White); therefore, all pipes should be replaced to insure a quality system which will not have interruptions in service.

- Magellan should be made to hook up the storage tank to the homeowners' system.

- The location of the cistern should be a joint agreement between Magellan and the water users.

- There should be some provision for the maintenance of water quality.

- Magellan should provide water to the homeowners during the construction period.

- There was not a notice for a date of completion; Mr. White does not want to be without water for a long period of time.

- A performance bond should be required to guarantee completion of the system.

- Magellan should be required to maintain and repair the system immediately when problems arise and the Trilby Homeowners and other water users would have the right to maintain and repair the system when Magellan fails to do so and be reimbursed for any maintenance or repair costs by Magellan.

- The ownership of the storage tank and additional delivery system should be jointly held by the Trilby Homeowners and other water users and the ownership of the system would go entirely to the Trilby Homeowners and other water users if Magellan or its successor abandons the system or ceases using water from it.

Regarding Objector White's concern about the quality of construction and use of inadequate material for the storage tank, the Proposed Order requires Magellan to install a buried, enclosed, 3000-gallon tank which would have two service line outlets, one for the Trilby homeowners and one for the Applicant. Applicant certainly would not use inadequate materials or poor construction methods to construct its own storage tank as such a practice would injure Applicant as much or more as it would the Trilby homeowners. The fact that the tank will be enclosed and buried will prevent contamination of the water.

Mr. White's allegation that the delivery pipe of the old system will be damaged in the construction of the storage tank is unfounded and not based on any part of the record. Magellan cannot be required to replace all pipes to insure a quality system which will not have interruptions in service. The old system has delivered water for many years and functions adequately as a conveyance system. There is no reason to replace the pipes. Magellan is required to hook up the storage tank to the homeowners system.

The location of the storage tank need not be a joint agreement between Magellan and the water users as suggested by Objector White. There is only one logical place for the storage tank and that is the current location of the small aluminum catch basin.

In order to provide an uninterrupted supply of water to the Trilby homeowners, Magellan is willing to install the storage tank during the week when the homeowners are not at their cabins. Because installation will take no more than one or two days, there should be no problem with a lack of water during construction.

The Department has no authority to require a performance bond nor can it grant ownership and maintenance responsibilities for the storage tank as requested by Mr. White.

Upon review of the evidence herein and consideration of the exceptions, the Findings of Fact and Conclusions of Law, with the

exception of Finding of Fact 11 modified herein, are hereby adopted by the Department.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application to Change Appropriation Water Right G(W)096235-76GJ is granted to Magellan Resources, Inc., to change the purpose of use and place of use of 73 gpm up to 4.5 acre-feet of water per year from a spring tributary of the North Fork of Flint Creek, also known as Trilby Spring, from January 1 through December 31 of each year. The purpose of use may be changed from domestic to mining. The place of use may be changed from domestic and lawn and garden facilities in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9, Township 5 North, Range 13 West, Deer Lodge County, to various exploratory drilling locations throughout Sections 4, 5, 8, and 9, Township 5 North, Range 13 West, Deer Lodge County. The diversion and conveyance works shall include 3,000 gallons of off-source storage in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9, Township 5 North, Range 13 West, Deer Lodge County.

Application by Magellan Resources, Inc., to change an additional 4.5 acre-feet per year for a total maximum annual appropriation for mining purposes of 9.0 acre-feet per year is hereby denied.

A. This Authorization is subject to all prior existing water rights in the source of supply. Further, this Authoriza-

tion is subject to any final determination of existing water rights, as provided by Montana law.

B. The appropriator must construct and maintain a buried, enclosed, 3000-gallon cistern to collect and store all water diverted from Trilby Spring for use by the appropriator or the several tracts known as the Trilby Homeowners' Association tracts. The tank must be located near the Trilby Adit in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9, Township 5 North, Range 13 West, Deer Lodge County. The water delivery pipeline for conveying water away from the tank for mining use by the appropriator must tap the tank at or near the top of the tank. Water delivery pipelines to convey water to the domestic use of the appropriator or the Trilby Homeowners' Association tracts must tap the tank at or near the bottom of the tank.¹

C. The appropriator shall keep a written record of the volume of all waters diverted and shall, upon request of the Department, submit said records to the Water Resources Regional Office, 1520 E. 6th Ave., Helena, MT 59620-2301 Ph: (406) 444-6695. Volume of water diverted may be measured by multiplying the number of truckloads of water times the volumes of the truck containers. Appropriator may also accomplish the required measurement by installing a flow and volume meter on the diversion works.

¹ For an illustration of what is meant by "at or near" see Applicant's Exhibit 16.

D. The issuance of this Authorization by the Department shall not reduce the appropriator's liability for damages caused by appropriator's exercise of this Authorization, nor does the Department in issuing the Authorization in any way acknowledge liability for damage caused by the appropriator's exercise of this Authorization.

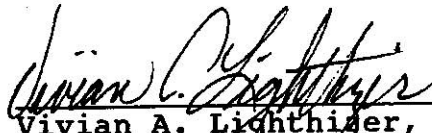
E. Upon a change in ownership of all or any portion of this Authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1991).

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 8th day of December, 1992.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 8th day of December, 1992, as follows:

Magellan Resources, Inc.
1111 Bayhill Drive, Suite 210
San Bruno, CA 94066-3035

Jack M. Scanlon
Carolyn M. Scanlon
1606 Harris Court
Helena, MT 59602

Elmer A. Johnson
2005 W. Park St.
Anaconda, MT 59711

Thomas R. White, Personal Rep.
Raymond V. White Estate
601 Locust Street
Anaconda, MT 59711

Carol Diane Foster Burton
8438 SW 42nd Ave.
Portland, OR 97219

Monida Unti
317 West Commercial
Anaconda, MT 59711

Daniel W. Unti
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701 Fifth Avenue
Seattle, WA 98104

Mark Behan
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Missoula, MT 59807

Richard Urwiller
Roberta Urwiller
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Denver, CO 80642

Bette Lou Swanson
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Anaconda, MT 59711

Gary L. Beck
Beverly J. Beck
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Deer Lodge, MT 59722

Larry Beck
Violet Beck
1101 West Park Avenue
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Bruce Evans, Jr.
Cynthia Evans
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P.O. Box 1715
Helena, MT 59624-1715

Ted J. Doney
Doney, Crowley & Shontz
P.O. Box 1185
Helena, MT 59624-1185

Judge James E. Purcell
P.O. Box J
Butte, MT 59703
(for notification only)

Georgetown Lake Home Owners'
Association, Inc.
% Leo V. Kelly, Jr., V.P.
Georgetown Lake
Anaconda, MT 59711
(for notification only)

T.J. Reynolds and
Jim Beck
Helena Water Resources
Regional Office
1520 East 6th Avenue
Helena, MT 59620-2301

John E. Stults,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION)
WATER RIGHT G(W)096235-76GJ BY)
MAGELLAN RESOURCES, INC.)

PROPOSAL
FOR DECISION

* * * * *

Pursuant to Mont. Code Ann. §§ 85-2-121 and 85-2-309 (1989),
a hearing was held in the above matter on May 11, 1992, in
Anaconda, Montana, to determine whether the Authorization to
Change Appropriation Water Right G(W)096235-76GJ should be
granted to Magellan Resources, Inc., under the criteria in Mont.
Code Ann. § 85-2-402(2) (1989).

APPEARANCES

Applicant appeared at the hearing by and through Holly J.
Franz, attorney at law. Nolan Dale Smith, Project Geologist for
Magellan Resources, Inc., appeared as witness in behalf of
Applicant. Jim Beck, Agricultural Specialist with the Helena
Water Resources Regional Office of the Department of Natural
Resources and Conservation (Department), was called and appeared
as a witness in behalf of Applicant.

Objectors Jack M. and Carolyn M. Scanlon, Gary L. and
Beverly J. Beck, Larry and Violet Beck, Richard and Mary Gran-
berg, Richard and Roberta Urwiller, and William Inkret, Jr.,
M.D., Trust and Individually appeared at the hearing by and
through Jack M. Scanlon, attorney at law. This group of

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objectors is collectively referred to as the "Snowbird Homeowners' Association" or "Objectors Snowbird."

Objectors Carol Diane Foster Burton, Monida Unti, Mark Behan, Cynthia Evans and Bruce Evans, Jr., and Thomas R. White, Personal Representative for the Raymond V. White Estate appeared at the hearing by and through Ted J. Doney, attorney at law. This group of objectors is collectively referred to as the "Trilby Homeowners' Association" or "Objectors Trilby."

Objector Elmer A. Johnson appeared at the hearing on his own behalf.

Objector Bette Lou Swanson appeared at the hearing on her own behalf.

Objector Mary D. Podobnik and Objector Jeanne Boyer failed to appear at the hearing. The record shows a properly constituted Notice of Hearing was properly served on all parties on December 19, 1991, by certified mail, return receipt requested. See Mont. Admin. R. 36.12.204(1) (1991). Return receipts were received by the Department, each with a signature indicating receipt. A Notice of Continuance was sent to all parties on April 27, 1992, identifying the date, time, and location of the hearing. The Hearing Examiner received no communication from the missing objectors prior to the hearing or subsequent to the close of the record.

The Hearing Examiner ruled at the hearing that all missing objectors were in default. That ruling is hereby confirmed. The

defaulted objectors no longer retain the status of parties in this matter. Mont. Admin. R. 36.12.208 (1991).

EXHIBITS

Applicant offered the following exhibits for inclusion in the record. All of Applicant's exhibits were accepted into the record without objection, except as specifically stated below.

Applicant's Exhibit 1. Copy of abstract of Water Right 76GJ-W-096235-00, owner: Gerret M. Ouldhouse, apparently copied from a page in the Montana Water Court's Temporary Preliminary Decree of the Flint Creek Basin. (1 page)

Applicant's Exhibit 2. Copy of Master's Report for Case No. 76GJ-13 (76GJ-W-096235-00), Montana Water Court, dated December 19, 1989. (2 pages)

Applicant's Exhibit 3. Copy of Order Adopting Master's Report for Case No. 76GJ-13 (76GJ-W-096235-00), Montana Water Court, dated January 4, 1990. (2 pages)

Applicant's Exhibit 4. Copy of a map illustrating the locations of the homeowner lots in the "Trilby Lode MS 9587", with the words "Rainbow Camp Water System, NS 1991" in the lower right-hand corner. Stipulated corrections made at the hearing are in blue ink. (1 page)

Applicant's Exhibit 5. Copy of Warranty Deed between Evelyn Hardtla and Gerret M. Ouldhouse dated December 31, 1969. (3 pages)

Applicant's Exhibit 6. Hand-drawn diagram on a 27" x 32" sheet titled "Trilby Water System" illustrating upper part of the current Trilby Spring water system.

Applicant's Exhibits 7-14. Eight 10 3/4" x 13 3/4" color photographs of the current Trilby Spring water system.

7 - Shows the Trilby mine adit, overflow pipe, and catch basin.

8 - Shows water flowing from the overflow pipe into the catch basin and then into a small holding tank below the catch basin.

9 - Shows the tap in the main line between the Trilby mine adit and Adit #1 (see Applicant's Exhibit 15).

10 - Shows Adit #1 and the pipe that used to carry water from the tap through Adit #1 to the concrete storage cistern.

11 - Shows Adit #1 looking into it from the entrance.

12 - Shows the top of the concrete cistern and Adit #1 in the distance

13 - Shows the concrete cistern with the pipe from the tap entering the cistern at the near right corner.

14 - Taken from on top of the concrete cistern showing the old railroad bed and the Evans' cabin in the distance.

Applicant's Exhibit 15. Hand-drawn diagram on a 27" x 32" sheet titled "Trilby Water System Plan View" illustrating the existing Trilby Spring water distribution system including the homes and other buildings served. An additional feature at the top of the system was added at the hearing in purple ink.

Applicant's Exhibit 16. Hand-drawn diagram on a 27" x 32" sheet titled "Trilby Water System Proposed Change" illustrating the upper part of the Trilby Spring water system with Applicant's proposed modifications. The parties stipulated that this exhibit be introduced into the record for illustrative purposes only. The Hearing Examiner admitted the exhibit as stipulated.

Applicant's Exhibit 17. A 37 1/4" x 38" blue line map titled, "Magellan Resources Corp. Geologic Map of Southern Cross, Deer-lodge Co., Montana", with plastic overlay. The map was purportedly developed by Applicant from 1988 aerial photographs. Various geological formations are named and outlined in different colors on the map, and the locations of known springs and wells are illustrated in blue on the overlay. (1 map and 1 overlay) Objectors Snowbird objected to this exhibit as not competent to show the geology of the area. Objection was overruled.

Applicant's Exhibit 18. Copy of a Letter with attachments dated October 31, 1991, to Ted Doney from Jim Beck regarding Trilby Homeowners' Water Supply. (5 pages)

Applicant's Exhibit 19. Hand-drawn diagram on a 27" x 32" sheet illustrating the existing Snowbird Homeowners' Association water system. (Drawn at the hearing by Gary Beck.)

Applicant's Exhibit 20. Copy of note dated July 18, 1990, written by Thomas R. White comparing water flow in 1990 to water flow in the past. (1 page)

Objector Snowbird Homeowners' Association offered the following exhibit which was accepted into the record without objection.

Snowbird's Exhibit 1. Copy of map titled "PRECIPITATION, Accumulated January - May 2, 1992." (1 page)

Objectors Trilby offered the following exhibits for inclusion in the record. All of Objector Trilby's exhibits were accepted into the record without objection, except as specifically stated below.

Trilby's Exhibit 1. Copy of water flow measurement figures, times, and dates titled "Trilby Spring Overflow." (1 page)

Trilby's Exhibit 2. Copy of a Material Safety Report regarding the product Minex 1330 Flocculent. (1 page) Parties stipulated to the admission of this exhibit with the exclusion of the handwritten notation "=10ppm !". The Hearing Examiner admitted the exhibit as stipulated.

Trilby's Exhibit 3. Copy of the Statement of Claim and Department's file for Water Right 76GJ-W-096235-00, owner: Gerret M. Ouldhouse. (36 pages)

Trilby's Exhibit 4. Copy of "Bargain and Sale Deed" between Hardtla and Henroid dated August 18, 1961. (2 pages)

Trilby's Exhibit 5. Copy of "Grant Deed" between Bohnert and Evans dated July 1976. (1 page)

Trilby's Exhibit 6. Copy of hand-drawn sketch of Trilby water system with water lines outlined in red, titled "Water System 1991 T. White." (1 page)

Trilby's Exhibit 7. Copy of Statement of Claim for Water Right 76GJ-W-026047-00, Owner: Raymond White. (6 pages)

Trilby's Exhibit 8. Copy of Statement of Claim for Water Right 76GJ-W-012955-00, Owner: Mark J. Behan. (7 pages)

Trilby's Exhibit 9. Copy of Declaration of Existing Water Right D28-g76G, Claimant: Mark J. Behan. (5 pages)

Trilby's Exhibit 10. Copy of letter dated March 20, 1991, to Garret [sic] Ouldhouse from Mark Behan. (1 page) Applicant objected to this exhibit on grounds that it is irrelevant to this proceeding because it leads to a readjudication of the subject water right and because allegations contained in the letter about Applicant's intentions are not related to the issues in this proceeding. The Hearing Examiner accepted the exhibit for the purpose of showing that Objectors Trilby had asked Mr. Ouldhouse what his intent was in filing water right claim W096235, and that no weight would be given to the allegations.

Trilby's Exhibit 11. Copy of letter dated April 2, 1991, addressed to "To Whom this may concern" from G.M. Ouldhouse. (1 page)

Trilby's Exhibit 12. Copy of "Agreement Creating Easement" between Ouldhouse and Behan dated March 2, 1976. (3 pages)

Trilby's Exhibit 13. Copy of letter dated March 25, 1991, to Kathryn Lambert, Water Master, from Mark Behan. (1 page)

Trilby's Exhibit 14. Copy of "Amendment" to Water Right Claim 76GJ-W-012955-00, Owner: Mark Behan. (2 pages)

Trilby's Exhibit 15. Copy of "Notice of Objection" for Water Right Claim 76GJ-W-012955-00 filed by Mark Behan, dated April 1, 1991. (4 pages)

Trilby's Exhibit 16. Copy of Letter dated April 2, 1991, to Mark Behan from Kathryn Lambert, Water Master. (2 pages)

Mr. Scanlon, on behalf of Objector Elmer Johnson, offered the following exhibit which was accepted into the record without objection.

Johnson's Exhibit 1. Copy of a Well Log Report for Elmer A. Johnson dated October 11, 1985. (1 page)

The Department's file on this application was made available to all parties for review prior to the hearing. The parties stipulated to the inclusion of the Department's file in the record with the exclusion of all discovery requests and responses to discovery requests. See Mont. R. Civ. P. 26(a) (1991). The file was entered into the record at the hearing by the Hearing Examiner with the exception of the following materials deposited in the file for storage but excluded from the record:

- Objectors Snowbird's Objector's Interrogatories and Requests for Production of Documents, dated November 25, 1991.
- Applicant's Response to Objector's Interrogatories and Requests for Production of Documents, dated December 20, 1991, and being three pages with no attachments.
- Applicant's Discovery Request to All Parties, dated April 17, 1992.

- Applicant's Discovery Request to All Parties, dated April 23, 1992.
- Magellan's Response to Discovery Requests, dated May 6, 1992, and being five pages with forty-seven pages of attachments.
- Objectors Snowbird's Response to Discovery Request, dated May 7, 1992, and being three pages with no attachments.

The Hearing Examiner has taken notice of the computer and microfiche records maintained by the Department on water rights in the general area of the source of the subject water right. Facts in this Proposal for Decision which have been derived from the noticed records are identified as such.

PRELIMINARY MATTERS

I. On May 7, 1992, Applicant filed a Motion in Limine to exclude from the hearing all evidence which contradicts the parameters of Water Right 76GJ-W-096235-00 as adjudicated by the Montana Water Court, and all evidence relating to alleged impact of Applicant's exploratory drilling program. Upon opening the record at the hearing, the Hearing Examiner denied the Motion in Limine on both parts for the following reasons. Firstly, as was previously described in ruling on Objectors Trilby's April 21, 1992, Motion for Certification, the existence and extent of the subject water right would be an issue for consideration at the hearing which may include consideration of evidence contradicting the Water Court Temporary Preliminary Decree. In the second part, there may be aspects of Applicant's exploratory drilling

program which relate to the proposed use of the water appropriated under the subject water right and therefore must be considered in determining whether the changed use will have an adverse effect on the water rights of other appropriators. With regard to the latter part, the Hearing Examiner admonished the parties to hold closely to the statutory criteria, particularly with respect to issues of beneficial use and potential adverse effect.

II. During the course of Applicant's presentation of its case in chief, Objectors Trilby made a Motion to Dismiss the application on grounds that the proposal brought forward at the hearing was not the proposal that was publicly noticed and therefore the Objectors are harmed by the lack of opportunity to analyze the proposal and prepare to address it. The Hearing Examiner reserved ruling on the Motion until the issuance of this Proposal for Decision. For the following reasons the Motion to Dismiss is hereby denied.

The parties, particularly Objectors Trilby, have been aware of Applicant's proposal to incorporate a new storage tank into the diversion and conveyance system in hopes of ensuring the absence of adverse effect on other appropriators. This proposal was the subject of Applicant's Exhibit 18 which is a letter written by Jim Beck to Ted Doney at the request of Ted Doney. Furthermore, an application may be amended after public notice of the application if the amendment would not prejudice anyone, party or non-party, that is, those persons who received notice of the application as originally proposed but did not object would

not alter their position due to the amendment. See In re Applications W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an instream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the place of use. See In re Application 50272-g42M by Joseph F. Crisafulli. Furthermore, the Department may modify an application if it prepares a statement of its opinion and the reasons therefore. Mont. Code Ann. § 85-2-310(2) (1991).

Adding a small reservoir for storage and allocation of the water after it has been diverted and prior to its use does not imply an increase in the burden on the source beyond what was identified in the notices of this application because the impact on the source is confined to the initial diversion of water away from the natural aquifer. Therefore, the proposed project may be amended without further public notice to add a 3000-gallon storage tank, as described by Applicant. See Finding of Fact 16, below.

III. During the course of the hearing, Applicant objected to the presentation of evidence on the potential effects of the

use of Minex 1330, a drilling mud, with the water appropriated under the water right being proposed for change on grounds that it was not relevant. The objection was overruled for the following reason. The Hearing Examiner found that potential pollution of the very water appropriated under the water right proposed for change coupled with the potential of the very same water migrating to the diversion systems of other appropriators was relevant to the criterion expressed in Mont. Code Ann. § 85-2-402(2)(a) (1989). In distinction from the Hearing Examiner's later ruling relating to presentation of evidence on the alleged impacts of Applicant's exploratory drilling program (see IV, below), the activity being proposed, i.e., diluting Minex 1300 and applying it to lubricate drilling apparatus, would change the condition of the very water appropriated under the subject right such that the water itself could subsequently cause adverse effect. See Preliminary Matters Item IV, below. The use of the water being considered in this instance is specifically to dilute drilling muds, and the question is whether this specific use would result in impacts that would cause other appropriators to be unable to reasonably exercise their water rights. This is a question for consideration in determining whether the statutory criteria can be met. See Conclusion of Law 9, below.

IV. At two points during the course of the hearing, Applicant objected to questions by Objectors Snowbird that went specifically to the exploratory drilling program, *per se*, as being irrelevant to the issues in these proceedings. It was

Objectors Snowbird's contention the questions relate to Applicant's ability to prove the criterion stated in Mont. Code Ann. § 85-2-402(2)(a) (1989): "[t]he proposed use will not adversely affect water rights of other persons...", and that the phrase "proposed use" includes the exploratory drilling program generally. After some discussion the Hearing Examiner sustained the objections for the following reasons. Though there may be an impact on objectors' property and ability to exercise their water rights from mining and drilling in the area, the impacts would be from the mineral exploration itself, an activity which has gone on prior to the subject application, continues to go on, and will go on in the future regardless of the outcome of these proceedings. Mineral exploration by Applicant has and could be conducted without water, either from this water right or any other. The Department of Natural Resources and Conservation does not have regulatory jurisdiction over mining activity in Montana; that is the responsibility of the Department of State Lands. Applicant is subject to the laws of Montana administered by the Department of State Lands.

As to the law the Department of Natural Resources and Conservation must administer in this matter, "proposed use" in Mont. Code Ann. § 85-2-402(2)(a) (1989) means the specific action that an applicant proposes to perform with the water, including the inherent attributes of the action, such as its location, timing, condition, and how consumptive it is. Applicant is proposing to use this water, specifically, to lubricate the

drilling apparatus. If there is an impact, it is not a consequence of an inherent attribute of the specific use of the subject water right; it is a consequence of the mineral exploration activity regulated by the Department of State Lands.

There are reasons for making such distinctions. A person performing a regulated activity in Montana should not be placed in a form of double jeopardy nor should the person have to make the same proof twice to the same government that a single action is allowable. Neither should the government waste resources on duplication of regulatory review. Therefore, issues regarding impacts of a regulated activity must be directed to the agency of expertise and authority for regulating the specific activity that produces the impact. It is not the lubricating of the drilling apparatus that is causing the impact Objectors Snowbird allege, but the drilling itself. Allegations about the general mineral exploration activity of Applicant, i.e., the exploratory drilling, are not relevant to the scope of these proceedings.

V. At the close of Applicant's presentation of their case, Objectors Snowbird made a Motion for Directed Verdict on grounds the Applicant had failed to provide evidence that they were the party in interest, that the proposed use is a beneficial use, and that the proposed change would not adversely affect other appropriators. The Hearing Examiner denied the Motion for Directed Verdict at that time for the following reasons. The parties had previously agreed to allow Applicant to provide an additional deed in the chain of title, for the record with opportunity for

responses by Objectors. Applicant had given evidence that the use of the water would benefit them which is an element in the determination of whether the use is beneficial under the law. Applicant's proposed storage facility is offered as a means of avoiding adverse effect to other appropriators, and by this alone, the threshold of a prima facie showing had been crossed.

FINDINGS OF FACT

1. Application to Change Appropriation Water Right

G(W)096235-76GJ was filed with the Department of Natural Resources and Conservation on October 19, 1990, at 11:15 a.m. (Department's file)

2. Pertinent portions of the application were published in the *Philipsburg Mail*, a newspaper of general circulation in the area of the proposed source, on March 21, 1991. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. See Preliminary Matters, above. (Department's file)

3. Fifteen timely objections were received by the Department. The principal issues raised by the objections are:

- Applicant's proposed changes would adversely impact water rights of other appropriators.

- The means of diversion is incapable of accurate measurement and therefore is inadequate.

- Applicant does not own the water right it is proposing to change.

- Applicant is proposing to appropriate additional water from the source over and above the amount to which they have a water right.

(Department's file)

4. Objectors remaining as parties in this matter own rights to the use of underground water in the general vicinity of the proposed change. See Appearances, above. (Department's file and records)

5. Applicant is requesting authorization to change the place of use and purpose of use of a water right documented by Statement of Claim for Existing Water Rights for the Water Courts of the State of Montana 76GJ-W-096235-00 filed by Gerret M. Ouldhouse and decreed on page 404 of the Temporary Preliminary Decree on the Flint Creek Basin. The water right was filed for domestic use of 73 gallons per minute (gpm) up to 12 acre-feet per year of water from a spring tributary of the North Fork of Flint Creek located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9, Township 5 North, Range 13 West, Deer Lodge County, and commonly called "Trilby Spring."¹ Applicant proposes to change a portion of the purpose of use from domestic to mining, specifically exploratory drilling. Applicant proposes to change the place of use of this water right, claimed as eight homes and 1.9 acres of lawn and garden in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9, to various exploratory

¹ Unless otherwise stated, all legal land descriptions in this Proposal are in Township 5 North, Range 13 West.

drilling locations throughout Sections 4, 5, 8, and 9. (Department's file and testimony of Nolan Smith)

6. Applicant holds leases on properties throughout the proposed place of use, and is pursuing additional leases.

(Testimony of Nolan Smith)

7. The Trilby Lode mining claim (M.S. 9587) was originally patented by Robert Lindborg in 1915. In 1958 Lindborg transferred the Trilby Lode mining claim to Mr. and Mrs. Clinton Hardtla. A December 31, 1969, Warranty Deed documents the transfer of the Trilby Lode mining claim from Evelyn E. Hardtla to Gerret M. Ouldhouse. A Purchase and Sale Agreement dated June 30, 1983, documents the sale of the Trilby Lode mining claim by Gerret M. Ouldhouse and Elizabeth N. Ouldhouse to David K. Hafer. Applicant is the assignee in the Assignment of Purchase and Sale Agreement which conveyed the June 30, 1983, Purchase and Sale Agreement from the North Lily Mining Company to Applicant. The Assignment speaks of the June 17, 1983, conveyance of David K. Hafer's interest to the Southern Cross Development Corporation and the subsequent conveyance of the Southern Cross Development Corporation's interest to the North Lily Mining Company. (Department's file, Applicant's Exhibit 5, and Trilby's Exhibits 3 and 9)

8. The properties owned by Objectors Trilby were originally part of the Trilby Lode mining claim. They were sold as separate tracts prior to the time when Evelyn E. Hardtla sold the Trilby Lode to Gerret M. Ouldhouse. The December 31, 1969, Warranty

Deed states, "the water right now enjoyed by the persons who received fractional parcels from the said Trilby Lode Mining Claim and identified hereinabove are reserved to them and the Grantee is not to interfere with the said water right as presently enjoyed by such persons." The original owner of the Trilby Lode mining claim, Robert Lindborg, had made a commitment to provide Trilby Spring water to the Trilby Homeowners and always honored that commitment. When the Hardtla's assumed ownership of the Trilby Lode, they also honored the commitment. (Applicant's Exhibit 5 and testimony of George Hardtla)

9. The tract presently owned by Bruce and Cynthia Evans was conveyed from Clinton G. Hardtla and Evelyn Hardtla to V. E. Henroid and Marion Henroid by a Bargain and Sale Deed dated August 18, 1961. The deed states that the tract was conveyed "[t]ogether with the right to use water when available emanating [sic] from a spring on the grantors premises for domestic purposes." The July 8, 1976, Grant Deed documenting the acquisition of the tract by Bruce and Cynthia Evans conveyed the tract "[t]ogether with the right-of-way to use water when available, for domestic purposes emanating from a spring on the premises of Clinton G. Hardtla which right-of-way was conveyed to the Grantors by Deed dated 8/30/61 ..." (Trilby's Exhibits 4 and 5, and testimony of Bruce Evans)

10. Documents submitted as part of Statement of Claim 76GJ-W-096235-00 state the claim was for water to supply eight

residences or households. The Statement of Claim form itself contains the statement that the water use claimed reflects a level equivalent to eight households of four persons each. In a letter with the salutation, "To Whom this may concern," and dated April 2, 1991, Gerret Ouldhouse states he was "responsible for furnishing water to the people who had homes on the Trilby Mining Claim. This was done. I filed for water rights two different times and these residences were included as users of the water supply." This letter was in response to Objector Behan's letter dated March 20, 1991, asking Gerret Ouldhouse for confirmation that the households indicated on the water right claim were those of Objectors Trilby. (Trilby's Exhibits 3, 10, and 11)

11. Statements of Claim to Existing Water Rights have been filed by Objector Behan and Objector White (members of the Trilby Homeowners' Association) on historic use of Trilby Spring water for domestic purposes on their respective tracts. The claims duplicate Statement of Claim 76GJ-W-096235-00 by Gerret Ouldhouse and were filed because of confusion over the specific procedures of the statewide water rights adjudication or as a hedge to ensure that all contingencies were covered and they would not somehow lose their water rights; not because they thought that the Ouldhouse claim did not include their use. To the contrary, Gerret Ouldhouse had told some of them he was filing collectively on all their uses of Trilby Spring. (Department's file, Trilby's Exhibits 7 and 8, and testimony of Bruce Evans and Tom White)

12. Trilby Spring is the outflow from a collapsed mine adit (commonly called "Trilby Adit"). Water in the Trilby Adit is collected by two pipes that come out of the entrance of the adit. One pipe carries water underground to a second collapsed mine adit (commonly called "Adit #1") where a system of valves and pipes splits the water into three separate service lines. The second pipe carries water above ground to a small aluminum catch basin over a buried holding tank which is about 30 gallons in capacity. From the holding tank, water is conveyed underground into the first line. The three service lines divide from the main supply line at the valves in Adit #1. One service line conveys water to the Behan property, a Trilby homeowner. A second service line conveys water to the properties of Evans, Burton, White, and Unti, all of whom are Trilby homeowners. The third service line conveys water to Applicant's buildings on the Trilby Lode mining claim. (Applicant's Exhibits 6 and 15, Trilby's Exhibit 6, and testimony of George Hardtla, Tom White, and Nolan Smith)

13. Water has been delivered from Trilby Spring to the buildings now owned by Applicant and to the homes now owned by Objectors Trilby by the present system for many years and functions adequately as a diversion and conveyance system. Applicant proposes to use this same system to divert and convey water from Trilby Spring, and then to place the water in trucks which will haul it to the various specific drilling sites. This has been

done satisfactorily in the past by Applicant. (Testimony of Tom White, Bruce Evans, and Nolan Smith)

14. There is no evidence in the record that the present system or the system as proposed by Applicant has any measuring devices capable of measuring the amount of water diverted by Applicant. The amount of water diverted by Applicant could be known by recording the volume of the trucks and the number of truckloads.

15. Applicant acknowledges that Objectors Trilby have rights to the domestic use of water from Trilby Spring. Applicant has stated that regardless of whether those water rights originated in the subject water right or as separate rights upon first use on the severed tracts, they intend to modify and operate the system to cause no impact on Objectors Trilby's water rights. (Trilby's Exhibit 16, testimony of Nolan Smith, and statements of Holly Franz)

16. Applicant will build a water storage tank onto the existing system near where the water comes out of the Trilby Adit. It will be a buried, enclosed, 3000-gallon tank which will have two service line outlets, one for the Trilby homeowners and one for Applicant. The Trilby homeowners' service line will tap the tank near the bottom and Applicant's service line will tap the tank near the top. This configuration ensures that any water in the tank will be available to the homeowners before it is available to Applicant and that the storage capacity of the tank will be primarily dedicated to the use of the homeowners.

(Applicant's Exhibit 16, Trilby's Exhibit 18, and testimony of Nolan Smith and Jim Beck)

17. Twenty measurements have been taken of flows from Trilby Spring that were flowing out of the overflow line into the catch basin, albeit fourteen of them were in a two month period in late fall of 1990. The flows ranged from 0.2 gpm up to four gpm. Objectors contend that this is insufficient water to operate the proposed system in a manner that can provide water to Applicant and Objectors Trilby.

This is not the entire output of Trilby Spring, however. Two separate pipes collect and convey Trilby Spring water. Photographs of the system taken on July 25, 1990, show a trickle flowing from the overflow pipe, but a strong flow (apparently well over four gpm) coming from a pipe that taps the main water line running from Trilby Spring to Adit #1 the point where it enters Adit #1. (Applicant's Exhibits 8 and 9, Trilby's Exhibit 1, and testimony of Nolan Smith and George Hardtla)

18. Exploratory drilling is performed by Applicant to determine the geology of an area for the purpose of identifying and locating minerals of extractible value. It is the intent of Applicant to mine minerals of extractible value that they locate on lands they have access to within the proposed place of use. (Department's file and testimony of Nolan Smith)

19. The exploratory drilling that Applicant has been and will be conducting sometimes requires a lubricant. Water or water mixed with drilling muds have been used by Applicant in the

exploratory drilling they have been performing on the proposed place of use. They propose to use the changed portion of the subject water right in the same way. (Department's file and testimony of Nolan Smith)

20. Applicant has used a drilling mud in the past called Minex 1330 Flocculent, a polyacrylamide copolymer. It is mixed with water at a ratio of 5 gallons of Minex 1330 to 2500 gallons of water. According to the manufacturer the product is hazardous. Direct contact with undiluted Minex can cause skin damage. Overexposure to vapors may cause drowsiness, dizziness, headache, nausea, and eye or respiratory irritation. Applicant has used the material in their drilling on the proposed place of use and has had no adverse health effects to persons working directly with the substance or to any of the Objectors. The State of Montana has approved Minex 1330 for the purpose Applicant has used and will use it. (Trilby's Exhibit 2 and testimony of Nolan Smith)

21. Applicant has tested the water coming out of Trilby Spring for several years and has found no change in the water chemistry. (Testimony of Nolan Smith)

22. No additional water will be taken from Trilby Spring under the proposed change. The system to be used will rely on the natural gravity flow from the spring that has been the historic use of Trilby Spring flows. (Applicant's Exhibit 16 and testimony of Nolan Smith)

23. There is no evidence other appropriators have relied on return flows or waste water flows that entered a natural channel after being released from the historic use, or that such flows ever existed.

24. There is a developed spring in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9, locally called "Scanlon Spring." Objectors Snowbird have Certificate of Water Right 32824-g76GJ to use 50 gpm up to 1.50 acre-feet per year of water from Scanlon Spring for domestic use.

In 1964 the flow from Scanlon Spring was about two feet wide and flowed year round and had since 1955. In 1977 water flowed out of the Scanlon Spring, then west toward Old Georgetown. In July or August of 1991 this spring dried up and it was dry at the time of the hearing in this matter. This is the first time there has been a total loss of water. Exploratory drilling has taken place at a higher elevation above the Scanlon Spring over the last three or four years. There are approximately 25 or 30 drill sites above Scanlon Spring. (Department's file and testimony of Gary Beck and George Hardtla)

25. Objector Johnson has a well in Old Georgetown that was drilled in October 1985. The depth to water below the land's surface at that time was 67 feet which remained relatively steady for several years. According to Mr. Johnson the depth to water for the six months prior to the hearing has been relatively steady at 140 feet. The well has not been used to appropriate water, and Mr. Johnson does not have a water right for the use of this well. There is some question about the depth of the well.

The well log completed by the driller states that the depth is 160 feet, yet Mr. Johnson says the well was drilled deeper at his request to 240 feet. In addition, the accuracy of Mr. Johnson's measurements cannot be certain, based on his description of his techniques. (Johnson Exhibit 1 and testimony of Elmer Johnson)

26. Objectors Snowbird contend that Applicant's mining activities have already caused groundwater sources in the area to diminish. It is their contention that the exploratory drilling has perforated the groundwater aquifers resulting in the lowering of groundwater levels in the strata that supply their infiltration gallery, Objector Johnson's well, and Trilby Spring. It is their contention that since the proposed use is the same exploratory drilling, and since Applicant has not proven the exploratory drilling is not the cause of diminished water availability in the area, the change should not be authorized. (Department's file and statements of Mr. Scanlon)

27. There are no other planned uses for or planned developments of water for which a permit has been issued or for which water has been reserved in the source of supply of the water right Applicant proposes to change. (Department's records and Department's file)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. § 85-2-309 and 402 (1989).

2. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1, 2, 3, 4, and 5.

3. The Department must approve a change in appropriation water right if the appropriator proves by substantial credible evidence that the criteria in effect at the time of the application for change, being in regard to this application Mont. Code Ann. § 85-2-402(2) (1989), are met:

- (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
- (b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.
- (c) The proposed use of water is a beneficial use.
- (d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. The Department has the authority to make and must make a threshold determination on the existence and extent of the water right an applicant proposes to change. See In re Application G31227-02-41F by Combs Cattle Co. (1991); In re Applications V111165-76H and V151753-76H by Worf (1988); In re Application G40605-410 by Crumpled Horn (1987); In re Applications G120401-41H and G120403-41H by Estate of Lena Ryen (May 1987); In re Applications 49632-s41H, G120401-41H, and G120403-41H by Estate of Lena Ryen (August 1987); In re Applications 51282-s410 and G139972-410 by Ben Lund Farms (1985); In re Application

V157350-76H by Miller (1985); In re Applications 26718, 26719, 26720, 26722, and 26723-c76LJ by Meadow Lake Country Club Estates (1981). Furthermore, the legislature in their 1989 amendment of Mont. Code Ann. § 85-2-227, Claim to Constitute Prima Facie Evidence, limited the statutorily defined *prima facie* evidence status of water right claims to the statewide adjudication process.

The Department may make a preliminary determination as to Applicant's ownership interest in the subject water right. See In re Application G(W)31227-41F by T-L Irrigation Company (1990).

5. As the buyer of the real property, i.e., the Trilby Lode mining claim, under contract for deed, Applicant can seek to change the purpose and place of use of the accompanying and appurtenant water right.

Applicant is the successor in interest to the subject water right, documented by Statement of Claim 76GJ-W-096235-00, through a contract for deed. See Findings of Fact 5 and 7. Ownership of water rights may be transferred under a contract for deed.

Schwend v. Jones, 163 Mont. 41, 515 P.2d 89 (1973). Under a contract for deed the buyer acquires a "real" right of property in the land, subject to the lien of the seller. Kern v. Robertson, 92 Mont. 283, 12 P.2d 565 (1932). The seller holds legal title as trustee for the buyer. Matter of the Estate of Wooten, 198 Mont. 132, 643 P.2d 1196 (1982). A contract for deed vests the entire equitable and beneficial interest of the land in the buyer. The seller retains mere title to the land as security for

the purchase price. The buyer's interest is in the real property, while the seller's is one of personal property. Musselman v. Mountain West Farm Bureau, ____ Mont. ____, 824 P.2d 271 (1992); see also Kern, above.

6. The Temporary Preliminary Decree of the Montana Water Court indicates that as of March 24, 1984, Gerret Ouldhouse was the sole owner of the water right Applicant proposes to change. See Finding of Fact 5. The evidence in the record, however, shows that the ownership reflected on the Statement of Claim, as subsequently decreed by the Water Court, does not reflect the severance of water rights that took place upon the sale of individual tracts subdivided out of the original Trilby Lode mining claim. See Findings of Fact 8, 9, and 10. The evidence in the record shows that members of the Trilby Homeowners' Association believe that Gerret Ouldhouse filed water right claim 76GJ-W-096235-00 in a way that included the water use on their tracts. See Finding of Fact 11. The evidence is that Gerret Ouldhouse meant the water right claim to reflect the water use on the Trilby Homeowners' Association tracts. See Findings of Fact 10 and 11.

An applicant for authorization to change is not entitled to create a greater demand on the source of supply than existed as a consequence of the previous use of the water right. See In re Applications G120401-41H and G120403-41H by Estate of Lena Ryen; In re Application G45422-76M by Paul A. and Natalie L. Hanson. Based on the evidence in this record as it relates to the ability

of the Applicant to change the subject water right without increasing the historic burden on the source (specifically, the total amount of water appropriated under all existing water rights), the extent of the water right appurtenant to the portion of the Trilby Lode which is available to Applicant is 73 gallons per minute up to 4.5 acre-feet per year.²

This is not an adjudication of the subject water right. See In re Applications 49632-s41H, G120401-41H, and G120403-41H by Estate of Lena Ryen; In re Application 42666-g41F by Richard MacMillan. It is a determination of the amount which can be allowed to be changed. The subject water right is not diminished by the granting of an authorization to change which is for less than the amount identified on a temporary preliminary decree. Any authorization to change a water right is subject to the final determination of the Water Court as to the extent of the water right. Should the final determination of the Water Court confirm the claimed amount, the authorization would be subject to reinterpretation. See In re Applications 20736-s41H and 20737-s41H by City of Bozeman; In re Application G45422-76M by Paul A. and Natalie L. Hanson. Furthermore, the use and utility of the subject water right is not altered by an authorization to change it. See In re Applications G-05081 and G-05083 by Neil W. Moldenhauer. The authorization gives permission to the owner of

² Eight claimed households minus 5 households belonging to Trilby Homeowners' Association members equals 3 households. Three-eighths of the total claimed volume of 12 acre-feet per year equals 4.5 acre-feet per year.

the water right to make a change, it does not actually make the change. The change is only perfected when the new use on the new place of use is actually completed, and then only to the extent that it is completed which may be for less than the authorized amount.

7. Applicant proved by substantial credible evidence that Applicant has a possessory interest in the property where the water is to be put to beneficial use. See Findings of Fact 5, 6, and 7. Therefore, the criterion in Mont. Code Ann. § 85-2-402(2)(d) (1989) has been met.

8. Applicant has proven by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 12 through 17.

Whether the flow from Trilby Spring at any given time is sufficient to satisfy the needs of all owners of rights to its water is not a criterion that must be proven in order to obtain authorization to change one of the water rights. See Mont. Code Ann. § 85-2-402(2) (1989); Finding of Fact 17. The system proposed by Applicant can divert and convey the water in the amounts proposed with reasonable efficiency and is capable of regulation. Therefore, the criterion in Mont. Code Ann. § 85-2-402(2)(b) (1989) has been met. See In re Applications 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale.

9. Applicant has proven by substantial credible evidence that the proposed change will not adversely affect the water

rights of other persons. See Findings of Fact 15, 16, 20, 21, 22, and 23. The modification to the system, which ensures the Trilby Homeowners' Association members will obtain the first water from the Trilby spring, will avoid any adverse effects from the change on their ability to reasonably exercise their water rights. See Findings of Fact 15 and 16.

Water quality is an attribute of a water right that is protectable from adverse effect under the criterion stated in Mont. Code Ann. 85-2-402(2)(a) (1989). The Department may not authorize a change which results in a degradation of water quality such that other appropriators are unable to reasonably exercise their water rights. See In re Application 61293-s40C by Goffena; In re Application 61978-s76LJ by Town; see also In re Application 71133-g41B by Hildreth; In re Application 69141-76G by Silver Eagle Mining; Mont. Code. Ann. § 85-2-401(1) (1989). Applicant provided sufficient evidence to prove that use of the water with the drilling mud, Minex 1330, will not be an adverse effect on groundwater appropriators in the area. See Findings of Fact 20 and 21.

The potential and occurring adverse effects alleged to occur on Scanlon Spring, Granite Spring, and groundwater sources in the area of Old Georgetown are not specifically attributable to the use of this water right under the proposed change. They therefore fall outside of the criterion stated in Mont. Code Ann. 85-2-402(2)(a) (1989). See Finding of Fact 24, 25, and 26; Preliminary Matters, above.

The proposed change will not adversely affect planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 27.

The criterion in Mont. Code Ann. § 85-2-402(2)(a) (1989) has been met.

10. Applicant has proven by substantial credible evidence that the proposed use of the water is a beneficial use. See Findings of Fact 18 and 19. Exploratory drilling is an integral activity within the general category of mining. Mining is a beneficial use of water. Mont. Code Ann. § 85-2-102(2)(a) (1991). The amount of water Applicant proposes to apply toward mining purposes is not wasteful. See Findings of Fact 13 and 19.

11. The Department has the authority to place conditions on permits. Mont. Codes Ann. § 85-2-402(7) (1989). A condition must be placed on the change authorization requiring that records be kept of all water diverted by Applicant to ensure that the amount of water which Applicant is authorized to change to mining use is not exceeded. See Finding of Fact 14. A condition must be added to the authorization requiring Applicant to make the modifications to the system it has represented to the Department and the objectors. See Finding of Fact 15 and 16.

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Authorization to Change Appropriation Water Right G(W)096235-76GJ is granted to Magellan Resources, Inc., to change the purpose of use and place of use of 73 gpm up

to 4.5 acre-feet per year of water from a spring tributary of the North Fork of Flint Creek, also known as Trilby Spring, from January 1 through December 31 of each year. The purpose of use may be changed from domestic to mining. The place of use may be changed from domestic and lawn and garden facilities in the NW¼NW¼ of Section 9, Township 5 North, Range 13 West, Deer Lodge County, to various exploratory drilling locations throughout Sections 4, 5, 8, and 9, Township 5 North, Range 13 West, Deer Lodge County. The diversion and conveyance works shall include 3,000 gallons of off-source storage in the SE¼NE¼NW¼ of Section 9, Township 5 North, Range 13 West, Deer Lodge County.

Application by Magellan Resources, Inc., to change an additional 4.5 acre-feet per year for a total maximum annual appropriation for mining purposes of 9.0 acre-feet per year is hereby denied.

A. This Authorization is subject to all prior existing water rights in the source of supply. Further, this Authorization is subject to any final determination of existing water rights, as provided by Montana law.

B. The appropriator must construct and maintain a buried, enclosed, 3000-gallon cistern to collect and store all water diverted from Trilby Spring for use by the appropriator or the several tracts known as the Trilby Homeowners' Association tracts. The tank must be located near the Trilby Adit in the SE¼NE¼NW¼ of Section 9, Township 5 North, Range 13 West, Deer Lodge County. The water delivery pipeline for conveying water

away from the tank for mining use by the appropriator must tap the tank at or near the top of the tank. Water delivery pipelines to convey water to the domestic use of the appropriator or the Trilby Homeowners' Association tracts must tap the tank at or near the bottom of the tank.³

C. The appropriator shall keep a written record of the volume of all waters diverted and shall, upon request of the Department, submit said records to the Water Resources Regional Office, 1520 E. 6th Ave., Helena, MT 59620-2301 Ph: (406) 444-6695. Volume of water diverted may be measured by multiplying the number of truckloads of water times the volumes of the truck containers. Appropriator may also accomplish the require measurement by installing a flow and volume meter on the diversion works.

D. The issuance of this Authorization by the Department shall not reduce the appropriator's liability for damages caused by appropriator's exercise of this Authorization, nor does the Department in issuing the Authorization in any way acknowledge liability for damage caused by the appropriator's exercise of this Authorization.

E. Upon a change in ownership of all or any portion of this Authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right

³ For an illustration of what is meant by "at or near" see Applicant's Exhibit 16.

Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1991).

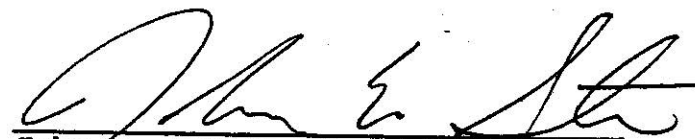
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. Defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by defaulted objectors on other substantive issues.

The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 1st day of September, 1992.



John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 1st day of September, 1992, as follows:

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San Bruno, CA 94066-3035

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Judge James E. Purcell
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(for notification only)

Georgetown Lake Home Owners'
Association, Inc.
* Leo V. Kelly, Jr., V.P.
Georgetown Lake
Anaconda, MT 59711
(for notification only)

T.J. Reynolds and
Jim Beck
Helena Water Resources
Regional Office
1520 East 6th Avenue
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Rachel Christ for Cindy G. Campbell
Cindy G. Campbell
Hearings Unit Legal Secretary